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No. 91-1196

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

T. L. HEGGY,

Petitioner,

v.

CATHERINE A. HEGGY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2521, provides a federal civil cause of action for damages against a former spouse for having wiretapped the family telephone while the parties were still living together as husband and wife.

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No. ____

T. L. HEGGY,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioner T. L. Heggy respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered on October 2, 1991. The Tenth Circuit has perpetuated and compounded a conflict

among the circuits on the important issue of whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2521, the federal wiretapping statute, applies in familial contexts.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 944 F.2d 1537 (10th Cir. 1991), and is reprinted in the Appendix at 8a (hereinafter "App.__"). The clerk's entry of judgment on this opinion is reprinted at App. 23a. The Tenth Circuit's denial of the petition for rehearing is reprinted at App. 24a.

The opinion of the district court denying petitioner's motion to dismiss was reported at 699 F. Supp. 1514 (W.D. Okla. 1988), and is reprinted in the Appendix at App. 26a. The clerk's entry of judgment on the jury verdict on February 28, 1990 is reprinted at App. 33a.

JURISDICTION

This action was brought in the United States District Court for the Western District of Oklahoma by respondent Catherine A. Heggy for civil damages pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2521.

The United States Court of Appeals for the Tenth Circuit entered its judgment on October 2, 1991, affirming the lower court's judgment in favor of respondent. Petitioner's Petition for Rehearing and,

in the Alternative, Suggestion of the Appropriateness of a Rehearing En Banc, filed October 16, 1991, was denied on November 7, 1991.

On December 17, 1991, Justice White signed an order extending the time for filing this petition for *certiorari* up to and including January 21, 1991. Petitioner now invokes the jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Tenth Circuit under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2521. Relevant portions of Title III -- §§ 2510, 2511, and 2520 -- are reproduced in the Appendix at 1a.

STATEMENT

In late November, 1986 (Tr. Vol. I at 5-6), approximately six months prior to his divorce from his wife Catherine, petitioner Tom L. Heggy placed a recording device on an extension of the family telephone in the barn adjacent to their home. App. 10a. At the time Mr. Heggy installed the device, he and Ms. Heggy were living together in their home as husband and wife. *Id.* The telephone was carried in Mr. Heggy's name. Tr. Vol. II at 26.

Mr. Heggy had been a law enforcement officer in Oklahoma for almost all of the prior twenty-seven

years (Tr. Vol. II at 9-16), and regarded himself as generally aware of the state of the law governing wiretaps (*id.* at 29-31). When Mr. Heggy placed the recording device on the family telephone, he believed that his action was legal. *Id.*[1]

For three months after installing the device, Mr. Heggy intercepted, *inter alia*, his wife's conversations on the family phone. App. 10a. Mr. Heggy played a small portion of one of the tapes to his secretary (Tr. Vol. I at 79; *see* App. 10a); otherwise, he kept the tapes to himself, until the Oklahoma court compelled their production in the Heggys' subsequent divorce proceeding. Tr. Vol. II at 42-43.

The Heggys were divorced in 1987, after Mr. Heggy sued for divorce on the grounds of incompatibility. Tr. Vol. II at 41. On Ms. Heggy's motion, the tapes were produced under protective order in discovery in the divorce proceeding only for the benefit of Ms. Heggy and her lawyer. *Id.* Vol. I at 153, 175. The tapes were not relevant or admissible evidence in the Oklahoma divorce proceeding.[2]

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[1]Mr. Heggy raised his good faith belief as a defense at trial (Tr. Vol. II at 29-31), but the judge ruled that such belief was not a defense (*Id.* at 121). The Tenth Circuit affirmed (App. 20a), and that issue is not raised before this Court.

[2]During the pendency of the Heggys' divorce, Oklahoma's statute regulating the admissibility of wiretap evidence barred the introduction of "[t]he contents of any intercepted wire, oral, or electronic communication or evidence derived therefrom" in any proceeding unless, at least ten days before the proceeding, each party "has been furnished with a copy of the court order and

(continued on next page...)

Ms. Heggy contested the divorce. Tr. Vol. I at 101. In the divorce decree, Ms. Heggy was awarded a total net value of the marital estate of $62,765.75, and Mr. Heggy received $25,840.74. *See* Decree of Divorce, *Heggy v. Heggy*, No. JFD-87-29 (Okla. Dist. Ct.- Logan Cty. Dec. 11, 1987). Ms. Heggy felt that the trial court had "erred and abused its discretion" regarding, *inter alia*, awarding certain property to Mr. Heggy, valuing the property in the marital estate, and failing to order alimony, so she appealed the trial court's divorce decree. *See* Appellant's Brief in Chief at 2, *Heggy v. Heggy*, No. 70,186 (Okla. Sup. Ct. May 6, 1988).

During the pendency of her ultimately unsuccessful appeal,[3] Ms. Heggy initiated this action against her ex-husband in federal court. Complaint, *Heggy v. Heggy*, No. Civ-88-1185-R (W.D. Okla. June 14, 1988). Ms. Heggy alleged that Mr. Heggy had violated the criminal provisions of Title III, 18 U.S.C. § 2511, by taping Ms. Heggy's conversations, thereby entitling her to compensatory and punitive damages under § 2520 of Title III. App. 10a.

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[2] (...continued from previous page)
accompanying application under which the interception was authorized." Okla. Stat. Ann. tit. 13, § 176.12 (West 1983). The statute was subsequently amended, effective November 1, 1989, to bar the introduction of "electronic" communication absent a court order, as well. *Id.* (West Supp. 1992).

[3] *See Heggy v. Heggy*, No. 70,186 (Okla. Sup. Ct. June 5, 1990) (mem. opinion affirming trial court judgment), noted in 61 O.B.J. 1608 (June 16, 1990).

Since the passage of the federal wiretap statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2521, its extension to cover interspousal and familial situations had been the subject of lively judicial debate.[4] Mr. Heggy filed a motion to dismiss before the district court on the ground that Title III does not apply to "interspousal wiretapping" -- that is, a spouse's placement of a recording device on a telephone within the marital home while the couple is living there as husband and wife. Acknowledging that the case was one of first impression in the Tenth Circuit (App. 29a), the district court nevertheless denied the motion. At trial, the jury returned a verdict for Ms. Heggy amounting to $75,000 in compensatory damages and $140,000 in punitive damages. App. 11a.

On appeal, the Tenth Circuit affirmed. The court noted that "[w]hether Title III provides a remedy for interspousal wiretapping within the marital home is a question that has divided the federal courts of appeal," (App. 12a), and recognized that "[t]he question has divided the federal district courts and state courts as well" (App. 12a n.3). The Tenth Circuit sided with those circuits which had held that "Title III does provide a remedy for such wiretapping" (App. 12a). The Court relied on the words of the statute, which it took to be inclusive, and on the legislative history, which it read to identify use of wiretapping in marital disputes as one of the evils which Congress had sought to address. App. 13a-19a.

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[4]*See, e.g., Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974); *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977); *Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984).

The legislative history was apparently critical in the *Heggy* panel's distinction of another Tenth Circuit decision which had held that Title III does not provide a private right of action for children against *parents* who tape the family phone. *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991), *cert. denied*, 60 U.S.L.W. 3479 (U.S. January 13, 1992); *see* App. 9a n.1. The *Newcomb* court had found that Congress had shown an intent in Title III to "abjure" from such interference with "familial relations," and to avoid determining "the extent of privacy family members may expect within the home vis-a-vis each other." *Id.* at 1536 (quoting *Simpson v. Simpson*, 490 F.2d 803, 809 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974). Although the Tenth Circuit in *Heggy* noted that it had written in *Newcomb* that "wiretapping the conversations of a minor child by a custodial parent" is "qualitatively different" from interspousal wiretaps (App. 9a n.1, quoting *Newcomb*, 944 F.2d at 1535), it did not attempt to explain the supposed distinction.

This petition seeks *certiorari* from the *Heggy* decision below.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE FEDERAL CIRCUITS ABOUT THE PROPER SCOPE OF TITLE III

In the sixteen years following passage of Title III in 1968, two circuit courts of appeals, the Second and the Fifth, addressed the issue of federal civil liability for tapping the family phone, and both rejected it.

Since 1984, however, the Fourth and Eighth circuits have extended federal liability under Title III to reach a spouse who taps the family phone. Now the Tenth Circuit has accepted liability for spouses, but rejected it for parents. This is a clear and significant conflict among the circuits and this petition asks this Court to address the confusion.

The Second and Fifth circuits have refused to extend Title III to interspousal wiretapping within the marital home because Congress did not adequately or clearly express the intent that Title III should intrude so far into traditional state authority over domestic relations. In 1974, in the first decision to address the issue, the Fifth Circuit noted that it must "seek indications of congressional intent and awareness before extending Title III" to interspousal wiretapping within the marital home, "[g]iven the novelty of a federal remedy for persons aggrieved by the personal acts of their spouses within the marital home . . . ." *Simpson v. Simpson*, 490 F.2d 803, 805-06 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974) (footnote omitted).[5] The *Simpson* court analyzed Title III and its legislative history and concluded "that Congress did not intend such a far-reaching result, one extending into areas

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[5]In *Simpson*, the appellee had attached a phone tap to phone lines within his home, and thus intercepted conversations between his wife and another man. 490 F.2d at 804. After intercepting compromising conversations, the appellee played the tapes for various family members and neighbors, as well as a lawyer, on whose advice the wife agreed to an uncontested divorce. *Id.* After the divorce was finalized, the appellant brought an action for violation of Title III and, having failed in the district court, appealed to the Fifth Circuit.

normally left to states, those of the marital home and domestic conflicts." *Id.* at 805 (footnotes omitted).

The Second Circuit, the next circuit court to address the issue of whether a person can sue his or her spouse under the civil liability provisions of Title III,[6] reached the same conclusion as the Fifth Circuit in *Simpson*: Title III does not reach interspousal wiretapping involving purely domestic conflicts. *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir.

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[6]In *United States v. Schrimsher*, 493 F.2d 848 (5th Cir. 1974), the Fifth Circuit determined that its holding in *Simpson* did not apply to shield a defendant from criminal liability for wiretapping the telephone of a woman he described as his "lover." The court noted that the defendant had never been married to the woman, was not a part of her household, and had no legal right to be on the premises or to tape record her telephone conversations. *Schrimsher*, 493 F.2d at 851. In *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976), the Sixth Circuit reversed the dismissal of an indictment of a defendant who had allegedly intercepted his estranged wife's telephone conversations "outside the curtilage of the residence." *Id.* at 663. The government's bill of particulars alleged that the defendant and his wife were no longer living together when the wiretaps occurred. The *Jones* court criticized the statutory interpretation in *Simpson*, but ultimately distinguished it on the basis that *Jones* was a criminal case and did not involve the marital residence. *Cf. also United States v. Rizzo*, 583 F.2d 907, 909-10 (7th Cir. 1978), *cert. denied*, 440 U.S. 908 (1979) (assuming that *Simpson* is correct, but concluding that "there is no implied derivative spousal immunity in favor of a private investigator" who "installed . . . or procured the spouse to install" a wiretap).

1977).[7] Although the Second Circuit believed that Congress "did not intend to blanketly except [interspousal wiretaps] from the Act's coverage" (*id.* at 677), it found that "the facts alleged here do not rise to the level of criminal conduct intended to be covered by the federal wiretap statutes . . . ." *Id.*

In 1984, however, in *Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984), the Fourth Circuit took a different view of interspousal wiretapping and upheld a civil action for tapping the family phone for the *first* time by any circuit court -- sixteen years after the statute's passage. The *Pritchard* court agreed with *Simpson* "to the extent that it stands for the narrow proposition that state and not federal courts are better suited to handle domestic conflicts." *Pritchard*, 732 F.2d at 374. Nevertheless, the court held that a husband could sue his former wife for civil damages under Title III for a wiretap she placed on the family phone to record her husband's conversations without his knowledge or consent. *Id.* at 372. The *Pritchard* court grounded its analysis on the broad language of prohibition in Title III, coupled with what it found to be Congressional awareness of interspousal wiretapping and intent to penalize it. *Id.* at 373-74. And in 1989, the Eighth Circuit, in *Kempf v. Kempf*, 868 F.2d 970 (8th Cir. 1989), followed *Pritchard* and held

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[7]In *Anonymous*, a woman sued her former husband for civil damages, alleging that he had taped conversations between her and their daughter during a period of marital strife prior to divorce. *Id.* at 678. The *Anonymous* court concluded that these facts constituted "a purely domestic conflict" over child custody in divorce, "a matter clearly to be handled by the state courts." *Id.* at 679.

that a woman could sue her former husband for allegedly recording her conversations on their marital home telephone while they were still living together as husband and wife. *Kempf*, 868 F.2d at 973.

Thus, as the Tenth Circuit acknowledged,[8] a direct conflict has arisen among the circuits. Two circuit courts have noted that Title III does not apply to interspousal wiretapping, while at least three circuits (including the court below) have held the opposite.[9] As a result, the reach and scope of Title III vary greatly throughout the nation, and federal law on the issue of liability for domestic taps cannot be uniformly applied. The Fourth and Eighth circuits have the broadest view of Title III. *Pritchard*, *Kempf*. Under the reasoning of those courts, Title III would

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[8]The Tenth Circuit candidly noted that "[w]hether Title III provides a remedy for interspousal wiretapping within the marital home is a question that has divided the federal courts of appeal," and recognized that "[t]he question has divided the federal district courts and state courts as well." App. 12a & n.3. *See, e.g.*, *Perfit v. Perfit*, 693 F. Supp. 851 (C.D. Cal. 1988) (no cause of action under Title III for interspousal wiretapping); *Lizza v. Lizza*, 631 F. Supp. 529 (E.D.N.Y. 1986) (same); *Robinson v. Robinson*, 499 So. 2d 152 (La. App. 1986) (same); *Baumrind v. Ewing*, 279 S.E.2d 359 (S.C.), *cert. denied*, 454 U.S. 1092 (1981) (same); *cf., e.g.*, *Flynn v. Flynn*, 560 F. Supp. 922 (N.D Ohio 1983) (cause of action exists under Title III for interspousal wiretapping); *Ex Parte O'Daniel*, 515 So. 2d 1250 (Ala. 1987) (same).

[9]Additionally, although the Sixth Circuit has not specifically ruled on whether a civil cause of action exists, its *Jones* decision clearly signals that a civil action would lie. *See Jones*, 542 F.2d at 666; *see also Farroni v. Farroni*, 862 F.2d 109, 110 (6th Cir. 1988) (parties agree that woman can sue her former husband under § 2520 if he tapped telephone conversations "willfully").

certainly cover any instance of one spouse tapping another, and may well extend criminal and civil liability to any and all wiretaps on the family phone. The Fifth Circuit, by contrast, has held that interspousal wiretapping of the family phone is *not* covered by Title III. *Simpson*. The Eleventh Circuit would also be bound by *Simpson*.[10] In the Second and Tenth Circuits, application of Title III to wiretaps of the family phone by family members appears to rest on some evaluation of intent and circumstances. *Anonymous*, *Heggy*, *Newcomb*. The Seventh Circuit has "presumed" that Title III does not apply to wiretaps on the family phone, but has never directly ruled on the issue. *See United States v. Rizzo*, 583 F.2d 907 (7th Cir. 1978), *supra* n.6. The *Jones* decision indicates that the Sixth Circuit would find that Title III applies to interspousal wiretapping within the family home, but the circuit has not ruled on the issue either. *See United States v. Jones*, 543 F.2d 661 (6th Cir. 1976), *supra* n.9.

The applicability of Title III in familial contexts is even more ambiguous in other circuits. One federal district court in the Ninth Circuit has ruled that Title III does not apply to interspousal wiretaps,[11] but otherwise that circuit has been silent on the issue. Federal district judges in the Eastern District of Pennsylvania have split on Title III's applicability to

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[10]*See Bonner v. City of Pritchard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981) (pre-October 1, 1981 Fifth Circuit decisions are "binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit").

[11]*Perfit v. Perfit*, 693 F.Supp. 851 (C.D. Cal. 1988).

interspousal wiretapping,[12] but the Third Circuit itself has not ruled on the issue. Finally, the First and District of Columbia circuits have been completely silent about the scope of Title III in familial contexts.

This conflict is significant because it involves basic issues of state authority, domestic relations, and statutory construction; because the conflict is widespread and long-standing; and because uniform and predictable enforcement of Title III is impossible while the conflict persists.

II. THIS COURT SHOULD REVIEW THE DECISION BELOW BECAUSE OF A CONFLICT BETWEEN FEDERAL CIRCUIT COURTS AND STATE SUPREME COURTS IN THOSE CIRCUITS ON THE ISSUE OF WHETHER TITLE III APPLIES TO INTERSPOUSAL WIRETAPS

The conflict and confusion among the circuits is also reflected within certain circuits, where the state courts are at odds with the relevant circuit courts of appeals. This is likewise a conflict which only this Court can resolve. *See, e.g.*, *Andresen v. Maryland*, 427 U.S. 463, 470 n.5 (1976); *Lakeside v. Oregon*, 435 U.S.

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[12] *Kratz v. Kratz*, 477 F. Supp. 463 (E.D. Pa. 1979) (action under Title III for interspousal wiretapping of the family phone allowed); *Remington v. Remington*, 393 F. Supp. 898, 901 (E.D. Pa. 1975) (finding that "Congress apparently did not intend to provide a Federal remedy for persons aggrieved by the personal acts of their spouses committed within the marital home," but allowing cause of action to go forward against wife who involved private detective agency and law firms in wiretapping scheme).

333, 336 & n.3 (1978); *Baldwin v. Alabama*, 472 U.S. 372, 374 (1985).

In both the Fourth and Eleventh circuits, there is an intrastate conflict between the federal and state courts over the scope of Title III in interspousal contexts. The federal courts in South Carolina are bound to allow a cause of action for interspousal wiretapping (following the Fourth Circuit's *Pritchard* decision), but the State's highest court has found that no such cause of action exists under Title III if the action is brought in state court. *Baumrind v. Ewing*, 279 S.E.2d 359, 360 (S.C.), *cert. denied*, 454 U.S. 1092 (1981).

Conversely, in Alabama, the federal courts, following the Fifth Circuit's *Simpson* decision,[13] would decline to allow a cause of action for interspousal wiretapping. Alabama's supreme court, however, has found that the federal statute applies to interspousal wiretaps. *Ex parte O'Daniel*, 515 So. 2d 1250, 1252-53 (Ala. 1987).[14]

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[13]This precedent would be binding on federal courts in the Eleventh Circuit. *See supra* n.10.

[14]An intermediate state court of appeals in Texas has similarly held that Title III applies to interspousal wiretaps, noting that the court was "not bound to follow the holding in [*Simpson*] merely because Texas lies within the geographic limits of the Fifth Circuit . . . ." *Turner v. PV International Corp.*, 765 S.W.2d 455, 470 (Tex. App. 1988), *rev. denied*, 778 S.W.2d 865 (Tex. 1989). In its *per curiam* denial of an application for a writ of error in *Turner*, the Texas Supreme Court expressly noted that it should "not be construed as approving or disapproving the holding of the court of appeals on

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Conflict thus reigns not only from circuit to circuit, but also from forum to forum within certain circuits. This situation multiplies the potential for unfair, inconsistent, and unexpected results among similarly situated people. This petition provides an opportunity to resolve this conflict and eliminate forum shopping by imposing uniformity on courts' interpretations of the scope of Title III.

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRINCIPLES OF COMITY AND FEDERALISM BY EXTENDING FEDERAL LAW INTO THE AREA OF DOMESTIC RELATIONS WITHOUT DIRECT AND SPECIFIC CONGRESSIONAL DIRECTION

All of the courts to address liability under Title III for tapping one's own home phone have recognized that such an extension is a far-reaching step into areas traditionally regulated by the state. The courts in favor of liability have ignored a basic precept of statutory construction repeatedly applied and enforced by this Court: "Because domestic relations are preeminently matters of state law, [this Court has] consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area." *Mansell v. Mansell*, 490 U.S. 581, 587 (1989). As a matter of both prudence and comity, therefore, this Court has required clear Congressional expression of the intent to intrude into domestic relations and family law matters before

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[14] (...continued from previous page)
the admissibility of the tape recorded conversations" at issue. 778 S.W.2d at 866.

finding that a statute requires or authorizes such intrusion. *See Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979); *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904); *see also, e.g., Mansell*, 490 U.S. at 587; *Rose v. Rose*, 481 U.S. 619, 625 (1987).

The degree to which the *Heggy* court strayed from this basic principle can be shown by comparing its decision to the reasoning in *Newcomb*, which the Tenth Circuit handed down barely a month before its *Heggy* decision. *See Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991), *cert. denied*, 60 U.S.L.W. 3479 (U.S. January 13, 1992). In *Newcomb*, the Tenth Circuit faced the closely related issue of whether an individual can sue his parent and grandparent under Title III. *Id.* The *Newcomb* court recognized that the basic issue is whether Congress can be taken to have addressed, in comprehensive and categorical fashion, "a very intimate question of family relations, that of the extent of privacy family members may expect within the home vis-a-vis each other." *Id.* at 1536 (quoting *Simpson*, 490 F.2d at 809). The *Newcomb* panel answered appropriately in the negative. 944 F.2d at 1536.

Consistent with this Court's precedent, the question of federal regulation of interspousal wiretaps should only be addressed in light of the presumption in favor of state authority most recently restated in *Mansell*, *supra*, and "in the light of the tacit assumptions upon which it is reasonable to suppose that [the statute's] language was used." *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930) (Holmes, J.). *Cf. Dewsnup v. Timm*, No. 90-741, slip op. at 7 (U.S. January 15, 1992) (noting Court's disinclination

to presume that Congress intended to depart from pre-Bankruptcy Code rule that liens pass through bankruptcy unaffected, given contrasting interpretations of Code provision). The "tacit assumptions" most relevant here are not the minutia of legislative history, but the general base of legal and factual knowledge which one must properly impute to the Congress of 1968 in order to interpret correctly the action they took. The "novelty" of the interpretation below is clearly shown by comparison with the assumptions of 1968.

First, Congress would have had to intend to give spouses causes of action against *each other* in domestic conflicts despite a century of recognition that "the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States . . ." *In re Burrus*, 136 U.S. 586, 593-94 (1890); *see Popovici*, 280 U.S. at 384 (noting Congressional recognition of the primacy of state law in domestic relations).[15]

Second, Congress would have had to intend to upset state laws giving divorce courts discretion to determine a just division of property between parties

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[15]*Cf. Ankenbrandt v. Richards*, No. 91-367 (U.S. cert. granted January 10, 1992) (petition granted to review, *inter alia*, whether there is a domestic relations exception to federal jurisdiction).

to a divorce, as well as alimony and child support.[16] Interspousal suits for damages under Title III necessarily interfere with state divorce courts' determinations of how parties should divide the family wealth when a marriage dissolves. Under the Tenth Circuit's interpretation of Title III below, for example, a recalcitrant former husband, against whom there has been rendered a spousal support and child support award in a state divorce proceeding, can upset the state court's assessment of how the familial assets should be divided if the former wife used wiretap surveillance during the marital dispute culminating in divorce. Nor is this an idle threat: evidence in this case suggests that Catherine Heggy was dissatisfied with her award in the state divorce proceeding (*see* Tr. Vol. I at 104-5), and filed this federal suit against Mr. Heggy in an effort to upset the state judgment and secure a greater "net" judgment from the divorce than the state court believed she was entitled to.

Third, Congress would have had to intend to override the policies of at least 37 states which, in 1968, still had common law or statutory rules prohibiting suits by one spouse against another for

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[16]For example, Oklahoma vests its divorce courts with vast discretion to determine the division of property, alimony, and child support. *See* Okla. Stat. Ann. tit. 43, §§ 118, 121 (West 1992). Having granted such discretion, the State's appellate courts rarely upset a decree, since they recognize that the trial court is in a much better position to determine what equity demands in each case. *See Farley v. Farley*, 275 P.2d 319 (Okla. 1954).

intentional torts.[17] *Cf.* App. 19a n.8 (decision below assumed preemption of interspousal immunity by Congress). Subsequent erosion of this doctrine does not erase it from the climate or assumptions of the time. *Cf.* App.19a n.8 (justifying extension of Title III to interspousal wiretaps partially on a *modern* "trend toward partial or total abrogation" of doctrine of interspousal immunity, and on policy judgment that doctrine is ill-suited to wiretap context).

Finally, Congress would have had to intend to criminalize wiretapping by an individual of family conversations on the family telephone. Under a broad and inclusive interpretation of the language of Title III (*see Pritchard*, *Kempf*),[18] it would not matter for criminal purposes what the individual's intentions were in tapping his or her phone. It would apparently be irrelevant who owns the phone, or which family member was being recorded. Can a father sue his child for Title III damages when she reaches majority because the child tapped the family phone to try to control her father's drug addiction? Does a cohabitating brother, sister, parent, child or friend have a right of action? Mr. Heggy claimed that he was motivated by death threats (App. 11a), another

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[17]*See* Note, 58 Temple L.Q. 709 & n.1 (1985) (listing states retaining interspousal immunity and dates on which other states abrogated the doctrine); Comment, *Interspousal Electronic Surveillance Immunity*, 7 U. Tol L. Rev. 1985, 190 n.27 (1975) (noting that, in 1975, thirty states and the District of Columbia still recognized some form of interspousal immunity).

[18]This would also seem to be the implication of the reasoning of the decision below, despite its distinction of *Newcomb*.

phone owner might have wanted to protect a minor from harassing calls or an aged parent from phone solicitors. The broadest decisions, and the implications of the analysis below, would seem to make any such behavior criminal regardless of motivation or circumstance and, moreover, make any individual who takes such action civilly liable under § 2520.[19]

In the real world of criminal enforcement of Title III, however, enforcement agencies seem to have answered these questions in the negative, and to have taken a narrower view: research has not revealed any case law since passage of the statute dealing with federal criminal enforcement against either spouses or parents for tapping the family phone. "Although not determinative, the construction of a statute by those charged with its administration is entitled to great deference, particularly when that interpretation has been followed consistently over a long period of time." *United States v. Clark*, 454 U.S. 555, 565 (1982); *see also, e.g., Bryant v. Yellen*, 447 U.S. 352, 366 n.16, 377 (1980); *United States v. Hill*, 120 U.S. 169, 182 (1887); *Edward's Lessee v. Darby*, 25 U.S. (12 Wheat) 206, 210 (1827).

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[19]Absent clear Congressional intent to reach interspousal wiretapping, Title III should not be construed so broadly. The decision below ignores this Court's direction that "[b]efore one may be punished, it must appear that his case is plainly within the statute . . . ." *United States v. Resnick*, 299 U.S. 207, 210 (1936). Thus, for example, recognizing "the severity of the remedy seemingly provided by Title III," the Fifth Circuit noted when it faced this issue that it was "bound by the principle that criminal statutes must be strictly construed, to avoid ensnaring behavior that is not clearly proscribed." *Simpson*, 490 F.2d at 806, 809.

The courts which have concluded that Congress did take such a sweeping step into domestic relations law with Title III have relied heavily on legislative history which shows that Congress was aware of the evils arising out of wiretapping in domestic disputes. Such awareness, however, does not provide "direct[] and specific[]" evidence that Congress intended to federalize the range of intimate questions of family relations and privacy implicated by this statute. *See Mansell*, 490 U.S. at 587.[20] As the *Simpson* court noted, Congressional interest in wiretapping in domestic relations cases focused on the intrusive behavior of private detectives (*see Simpson*, 490 F.2d at 807-09), and Congress expressed no intent to allow a *spouse* a cause of action against his or her spouse in domestic disputes based on tapping the family phone.

Interspousal wiretapping in domestic conflicts is "a matter clearly to be handled by the state courts." *Anonymous*, 558 F.2d at 679. "[I]t is unlikely that Congress intended its regulations to extend to such personal acts conducted within the marital home," since "[a]pplication of federal law to an interspousal domestic conflict would run counter to the tradition of leaving such matters to the realm of state courts."

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[20]The primary goal of Title III was to provide effective law enforcement by giving law enforcement personnel procedures by which they could permissibly tap telephones -- and to provide penalties when they did not follow the law. Title III, according to its legislative history, was principally designed to foster effective law enforcement by delineating "the circumstances and conditions under which the interception of wire and oral communications may be authorized." S. Rep. No. 1097, 90th Congress, 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 2112, 2153.

Perfit v. Perfit, 693 F. Supp. 851, 856 (C.D. Cal. 1988).[21] Absent clarification by this Court, however, Title III's scope will continue to be the subject of confusion, discord, and unfairness.

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[21] *See also, e.g.*, *Simpson*, 490 F.2d at 805-06; *Lizza v. Lizza*, 631 F. Supp. at 533 (if Title III extended to interspousal wiretapping, it "would have serious ramifications as to the degree of federal control over actions by family members within their homes"); *Baumrind v. Ewing*, 279 S.E.2d at 360 ("Domestic conflicts are traditionally and properly matters of state interest. We cannot believe Congress intended [Title III] to intrude as far as this case would take it"); *see also, e.g.*, Note, *All's Fair: No Remedy Under Title III for Interspousal Surveillance*, 57 Fordham L. Rev. 1035 (1989).

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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January 21, 1992

APPENDIX

STATUTORY PROVISIONS[1]

18 U.S.C. § 2510. Definitions

As used in this chapter --

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

* * * *

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[1]After the wiretap was placed on the family phone, but before it was removed, amendments to §§ 2510 and 2511 became effective modifying some definitions in § 2510, adding other definitions, and substituting "intentionally" for "willfully" in subsections (a)-(d) of § 2511(1). *See* App. 14a n. 4; *see also* 18 U.S.C.A. §§ 2510, 2511 (West Supp. 1991). None of the definitional changes impact this litigation, and the court below noted that the parties here had implicitly agreed that "the controlling statute is the one in effect" when the wiretap began. App. 14a n.4.

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than --

> (a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;
>
> (b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

* * * *

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such

communication or the existence, substance, purport, or meaning of that communication;

* * * *

18 U.S.C. § 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who --

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when --

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such persons acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * *

18 U.S.C. §2520.[2] Recovery of civil damages authorized

(a) In general. Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) Relief. In an action under this section, appropriate relief includes -

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) Computation of damages. (1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies

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[2] An amendment to § 2520 become effective during the time the wiretap was on the Heggy family phone, and the district court instructed the jury under the amended statute, which is provided here. *See* App. 15a n.5 (noting changes, effective January 21, 1987).

allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500.

(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000.

(2) In any other action under this section, the court may assess as damages whichever is the greater of --

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

(d) Defense. -- A good faith reliance on --

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;

is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) Limitation. - A civil action under this section may not be commended later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Catherine A. Heggy	)	
Plaintiff-Appellee,	)	
-vs-	)	No. 90-6122
T. L. Heggy	)	
Defendant-Appellant.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. 88-1185R)

Stephen Jones (Carol Hambrick, of Jones & Hambrick, Enid, Oklahoma, with him on the briefs) of Jones & Hambrick, Enid, Oklahoma, for Defendant-Appellant.

John C. McMurry (Gomer Smith, Oklahoma City, Oklahoma, with him on the briefs), Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Before MCKAY, Chief Judge, HOLLOWAY, Circuit Judge, and WINDER, District Judge.*

WINDER, District Judge.

Defendant-appellant Tom Heggy appeals from the final judgment of the district court in favor of plaintiff-appellee Catherine A. Heggy and against appellant for violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. §§ 2510-2521. Appellant's central argument is that the district court erred in ruling that Title III applies to interspousal wiretapping within the marital home. Additionally, appellant contends the district court erred in instructing the jury and in excluding certain evidence. We hold that Title III does apply to interspousal wiretapping within the marital home.[1] We also find that the district court's instructions and evidentiary rulings were not in error. We therefore affirm the judgment of the district court and remand this case for a determination of attorney's fees and costs on appeal.

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[1] The holding in this case decides the issue of the applicability of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 to interspousal wire tapping within the marital home. This court, however, has previously decided that 18 U.S.C. § 2510(5)(a)(i) does not apply to wiretapping the conversations of a minor child by a custodial parent. *See Newcomb v. Ingle*, ____ F.2d ____, No. 90-5068 (10th Cir. filed August 28, 1991). In the *Newcomb* decision, this court specifically noted that the type of situation addressed in this opinion is "qualitatively different from a custodial parent tapping a minor child's conversations within the family home." *Newcomb* slip op. at 4.

I. Background

During the last three years of his marriage to Catherine, Tom repeatedly told her he wanted a divorce. About six months before that divorce was granted, Tom placed a recording device on an extension telephone located in a barn to adjacent to the marital home. At the time he installed the wiretap, Tom and Catherine were living together as husband and wife. Also at that time, Tom was Director of the Oklahoma Bureau of Narcotics and Dangerous Drugs.

There was no court order authorizing Tom to place a wiretap on the marital phone. Tom did not inform Catherine of the wiretap nor did Catherine consent to it. Tom instructed the Bureau of Narcotics agent who installed the tap at his direction not to disclose its existence to any Bureau coworkers or to members of the Heggy household. The agent reminded Tom that the consent of one of the parties was necessary to record a telephone call.

For nearly three months, Tom used the wiretap to record Catherine's telephone conversations. He played at least one of those conversation for his secretary. Tom then catalogued the recorded interceptions and labeled them by date and content of conversation.

Following their divorce in 1987, Catherine brought this action against Tom under the civil damages provision of Title III, 18 U.S.C. § 2520, seeking both compensatory and punitive damages. Tom filed a motion to dismiss the complaint pursuant

to Fed. R. Civ.P. 12(b)(6) on grounds that Title III does not apply to a spouse's placement of a recording device on a phone within the marital home. The district court denied the motion. 699 F. Supp. 1514.

At trial, Tom claimed he installed the wiretap because he had been receiving death threats by telephone and wanted to record them. The jury rejected this explanation and returned a verdict in Catherine's favor for $75,000 in compensatory damages and $140,000 in punitive damages. The district court entered judgment on the verdict.

II. Discussion

A. Applicability of Title III to Interspousal Wiretaps

Appellant contends Title III does not apply to interspousal wiretaps[2] and thus the trial court erred in denying his motions to dismiss and for directed verdict. The district court's construction of a federal statute is a question of law that we review de novo. *In Re Thompson*, 894 F.2d 1227, 1228 (10th Cir. 1990). De novo review means we make an independent

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[2]We use the phrase "interspousal wiretaps" as a shorthand description for electronic surveillance directed by one spouse against another. The phraseology is imperfect, as the court in *Kratz v. Kratz*, 477 F. Supp. 463, 468 n. 10 (E.D. Penn. 1979) noted, because it does not describe the snooping spouse's interception of the communications of third parties with the targeted spouse. "[Catherine Heggy], of course, was not talking to herself on the telephone." *Kratz*, 477 F. Supp. at 468 n.10.

determination of the issues. *United States v. Irvin*, 906 F.2d 1424, 1426 (10th Cir. 1990).

Whether Title III provides a remedy for interspousal wiretapping within the marital home is a question that has divided the federal courts of appeal.[3] The Fourth, Sixth and Eighth Circuits have held that such wiretapping is actionable under Title III. *See Kempf v. Kempf*, 868 F.2d 970, 973 (8th Cir. 1989); *Pritchard v. Pritchard*, 732 F.2d 372, 374 (4th Cir. 1984); *United States v. Jones*, 542 F.2d 661, 673 (6th Cir. 1976). The Second and Fifth Circuits have held that Title III does not apply to interspousal wiretaps. *See Anonymous v. Anonymous*, 558 F.2d 677, 679 (2d Cir. 1977); *Simpson v. Simpson*, 490 F.2d 803, 810 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974).

After reviewing these authorities, and others, the district court below held that Title III, specifically 18 U.S.C. § 2520 thereof, does apply to interspousal wiretaps. *See Heggy v. Heggy*, 699 F. Supp. 1514, 1517 (W.D. Okla. 1988). We agree with the district court, and join the majority of federal circuit courts in holding that Title III does provide a remedy for such wiretapping. We believe this conclusion is compelled

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[3]The question has divided the federal district courts and state courts as well. *See, Perfit v. Perfit*, 693 F. Supp. 851, 855-56 (C.D. Cal. 1988) (Title III provides no civil remedy for interspousal wiretapping); *Nations v. Nations*, 670 F. Supp. 1432, 1436 (W.D. Ark. 1987); (civil remedy provided); *People v. Otto*, 226 Cal. App. 3d 1630, 1649, 277 Cal. Rptr. 596, 607 (Cal. Ct. App. 1991) (no remedy), *pet. rev. granted*, 280 Cal. Rptr. 91, 808 P.2d 234 (Cal. 1991); *Ransom v. Ransom*, 253 Ga. 656, 324 S.E.2d 437, 439 (1985) (remedy provided).

first and foremost by the clear and unambiguous language of the statute.

At the time Tom placed the wiretap on the phone, Title III provided in relevant part:

> (1) *Except as otherwise specifically provided in this chapter any person* who--
>
> (a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication; . . .
>
> (b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication . . .
>
> (c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication violation of this subsection; or
>
> (d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; . . .
>
> shall be fined not more than $10,000 or imprisoned not more than five (5) years, or both.

18 U.S.C. § 2511(1) (emphasis added).[4]

A civil cause of action for violation of § 2511 is provided by 18 U.S.C. § 2520 which, at the time the wiretapping in this case began, provided in part:

> *Any person* whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against *any person* who intercepts, discloses, or uses, or procures any other person to intercept, disclose or use such communications, and (2) be entitled to recover from *any such person*--
>
> (a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;
>
> (b) punitive damages; and

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[4]After the wiretap was placed on the Heggy phone on November 25, 1986, but before it was removed on February 16, 1987, an amendment to the statute became effective. Among other things, the amendment clarified the mental state required to violate the statute by substituting "intentionally" for "willfully" in subsections (a)-(d) of § 2511(1). *See* Electronic Communications Privacy Act of 1986, Pub.L. No. 9-508, § 101(f), 100 Stat. 1853 (1986) (effective Jan. 21, 1987); Senate Report 1986 Code Cong. & Admin. News at 3577. The parties implicitly agree that the controlling statute is the one in effect at the time the violation commenced. The subsequent amendment of the statute, however, does not alter our holding that §§ 2511 and 2520 apply to interspousal wiretapping.

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

18 U.S.C. § 2520 (emphasis added).[5]

As would seem clear from the emphasized language, Tom's wiretapping of the household phone is proscribed, and Catherine's recovery is allowed, because § 2511(l) prohibits the interception, use or disclosure of wire communications by any person except as *specifically* provided in the statute. And, furthermore, § 2520 provides a cause of action to *any* person who is the victim of a § 2511 violation. The statute defines "person" as "any individual," 18 U.S.C. § 2510(6), thus including Tom and Catherine. Finally,

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[5]This section of the statute was amended, effective January 21, 1987, as follows:

(a)In general. -- Except as provided in section 2511(2)(a) (ii), any person whose wire, oral, or electronic communication is intercepted, disclosed or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b)Relief. -- In an action under this section, appropriate relief includes --

(1) such preliminary and other equitable or declaratory relief as may be appropriate;
(2) damages under subsection (c) and punitive damages in appropriate cases; and
(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

18 U.S.C.A. § 2520(a)-(b) (Supp. 1991).

appellant makes no claim that any of the specific exceptions provided in 18 U.S.C. § 2511(2) are applicable.

Because the reach of the statute appears clear on its face, resort to legislative history would seem unnecessary. Appellant, however, urges the court to adopt the view in *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974), where the Fifth Circuit carved out an exception for interspousal wiretapping because it could find no specific indication in the legislative history that 8Congress intended the statute to reach that far. The *Simpson* court reached this conclusion despite the frank recognition that the "naked language" of Title III covered interspousal wiretapping. *Simpson*, 490 F.2d at 805.[6]

The *Simpson* court's approach to statutory construction has been criticized by courts and commentators. *See, e.g., Kempf v. Kempf*, 868 F.2d 970, 972-73 (8th Cir. 1989); *Kratz v. Kratz*, 477 F. Supp. 463, 468-69 (E.D. Penn. 1979); Comment, *Wiretapping and the Modern Marriage: Does Title III Provide a Federal Remedy for Victims of Interspousal Electronic Surveillance*? 91 Dick. L. Rev. 855, 872, 876 (1987) (hereinafter *"Wiretapping and Modern Marriage"*).

We reject not only the Simpson court's method of statutory analysis but also its interpretation of the

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[6]Perhaps in light of this recognition, the *Simpson* court candidly expressed "considerable doubt" about its holding, *Simpson v. Simpson*, 490 F.2d 803, 804 (5th Cir. 1974), and limited the holding to the specific facts of its case, *id.* at 810.

legislative history.[7] Instead, we agree with the district court that the legislative history of Title III evinces a congressional awareness of the widespread use of electronic eavesdropping in domestic relations cases and an intent to prohibit such eavesdropping. *See* Remarks of Sen. Long, Hearings on Invasions of Privacy Before the Subcomm. on Admin. Practice and Procedure of the Sen. Comm. on the Judiciary, 89th Cong. 1st Sess., part 5 at 2261 (1965-66) ("The three large areas of snooping in this (non-governmental) field are (1) industrial (2) divorce cases, and (3) politics. So far, we have heard no real justification for continuance of snooping in these areas.").

Professor Robert Blakey, generally credited as the architect of Title III, testified that "private bugging in this country can be divided into two broad categories, commercial espionage and marital litigation." Hearings on the Right to Privacy Act of 1967 Before the Subcomm. on Admin. Practice and Procedure of the Sen. Comm. on the Judiciary, 90th Cong., 1st Sess., part 2 at 413 (1967). Senator Hruska, a co-sponsor of the bill, commenting on the scope of the statute, noted that "[a] broad prohibition is imposed on private use of electronic surveillance, particularly in domestic

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[7]This criticism of *Simpson* is distinguishable from this court's previous citation to *Simpson* with approval in finding parental immunity from civil claims under Title III in *Newcomb*, slip op. at 5 (quoting *Simpson*, 490 F.2d at 809). In *Newcomb* this court placed the language from *Simpson* describing congressional intent to abstain from interference in the interrelationship of family members in the context of a House Judiciary Committee Comment concerning the right of a father to supervise his teenage daughter. *See Newcomb*, slip op. at 5 n.5.

relations and industrial espionage situations." S.Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 in U.S. Code Cong. & Admin. News 2112, 2274.

Moreover, and in light of the split of judicial authority, had it been the intent of Congress to keep interspousal wiretapping beyond the reach of Title III, Congress could have expressly excluded such wiretapping when it overhauled Title III in the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848. Although the Privacy Act amendments touched nearly every section of Title III, Congress did not codify the judicially created exception for interspousal wiretapping found in *Simpson*.

Finally, we reject appellant's contention that interpreting Title III to reach interspousal wiretapping results in unwarranted federal intrusion into the law of domestic relations, a subject traditionally left to state regulation. As the court stated in *Kratz v. Kratz*, 477 F. Supp. 463, 476 (E.D. Penn. 1979):

> Title III regulates electronic eavesdropping, not marital relations. It proscribes one method of gathering evidence for use in, *inter alia*, domestic relations cases, but in no manner deals with the merits of such cases. . . . The evils of electronic surveillance are not peculiar to the marital relationship and there is no more reason to permit husbands and wives to perpetrate these evils upon each other with impunity than there is to permit them legally to commit any other crimes against each other.

Kratz, 477 F. Supp. at 476. It is highly unlikely, as some courts have suggested, *see Lizza v. Lizza*, 631 F. Supp. 529, 533 (E.D.N.Y. 1986), that applying Title III to interspousal wiretapping will result in increased federal regulation of domestic relations. Rather, the more likely result is a decrease in interspousal wiretapping.[8] *See Wiretapping and Modern Marriage*, 91 Dick. L. Rev. at 882-83.

B. Defense of "Good Faith" Reliance on Mistake of Law

Appellant argues he was entitled to raise a "goodfaith" defense to appellee's claim that he violated Title III. At trial, appellant's counsel asked whether he thought there was "anything illegal" about

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[8]We also reject the view that appellant is somehow shielded from liability under the doctrine of interspousal tort immunity. The short answer to the immunity defense is that Title III creates a federal cause of action that cannot be barred by any state law or policy. *See Heyman v. Heyman*, 548 F. Supp. 1041, 1045 (N.D. Ill. 1982); *Kratz*, 477 F. Supp. at 475. Moreover, the outdated common law rationale for the doctrine -- that a woman's legal existence merged into that of her husband upon marriage -- has resulted in a trend toward partial or total abrogation of the doctrine. *See* Comment, *Wiretapping and the Modern Marriage: Does Title III Provide a Federal Remedy for Victims of Interspousal Electronic Surveillance?* 91 Dick. L. Rev. 855, 858-60 (1987); Note, *Husband and Wife – Interspousal Immunity for Intentional Torts is Unconstitutionally Irrational – Moran v. Beyer*, 58 Temp. L.Q. 709 n.1 (1985). Retention of the doctrine in the interspousal wiretapping context is particularly ill-founded because whatever domestic tranquility, that may have been fostered by immunity surely has been lost by the time one spouse is conducting electronic surveillance upon the other.

wiretapping his home phone. Tr. Vol. II at 29. The court sustained an objection to the question. Through counsel, appellant offered to testify that it was his opinion, based on his understanding of the law, that he could place a wiretap on the phone without his wife's consent. *Id.* at 31-32.

Whether a "good faith" defense based upon mistake of law exists under Title III is a question this court reviews de novo. *In Re Thompson,* 894 F.2d 1227, 1228 (10th Cir. 1990). Relying on *Campiti v. Walonis* 611 F.2d 387, 394-95 (1st Cir. 1979), the trial court rejected appellant's proffered testimony as irrelevant because there is no "good faith" defense based on a misunderstanding of the law. Tr. Vol. II at 121. We agree with the district court.

Title III expressly provides a good faith defense in a limited number of instances, such as reliance on a court warrant or order, grand jury subpoena or legislative or statutory authorization. *See* 18 U.S.C.A. § 2520(d) (Supp. 1991). Good faith reliance on mistake of law is not listed among these defenses. The law's reluctance to allow testimony concerning subjective belief after the fact reflects an obvious concern with the reliability of such testimony. Accordingly, we find no such defense available under the statute.

C. Willfulness/Intentional Instruction

The district court instructed the jury that "intentionally/willfully" was defined as follows: "An act is done 'intentionally or wilfully' if it is done knowingly and voluntarily as distinguished from

accidentally; or is done with a bad purpose; or without justifiable excuse; or stubbornly, obstinately or perversely." Rec. Vol. I, doc. 93. Appellant requested the following instruction: "An act is done 'intentionally' or 'wilfully' if it is done without ground for believing it is lawful, or if it is done with careless disregard of whether or not the act is lawful."

"When examining a challenge to jury instructions, we review the record as a whole to determine whether the instructions 'state the law which governs and provided the jury with an ample understanding of the issues and the standards applicable.'" *Big Horn Coal Co. v. Commonwealth Edison Co.*, 852 F.2d 1259, 1271 (10th Cir. 1988) (quoting *Ramsey v. Culpepper*, 738 F.2d 1092, 1098 (10th Cir. 1984)). An error in jury instructions will mandate reversal of a judgment only if the error is determined to have been prejudicial. *Id.* at 1271 n.19.

We believe the district court's instruction on the required mental state was a correct statement of the law, and, in any event, did not prejudice appellant. In addition to the willfulness/intentional instruction, the district court gave a punitive damages instruction that required a finding that appellant's wiretapping was done "maliciously," "oppressively," or "wantonly." Rec. Vol. I, doc. 93. The jury returned a verdict for both compensatory and punitive damages. Thus, assuming the district court should have given appellant's requested instruction, such refusal was not reversible error in light of the jury's implicit finding of recklessness in its award of punitive damages.

We find appellant's remaining contentions regarding the admissibility of the illegally obtained tapes and the exclusion of evidence of appellee's suspicion that her phone was taped to be without merit.

III. Conclusion

For the foregoing reasons, we AFFIRM the district court's final judgment in favor of appellee and against appellant for violation of Title III. We REMAND to the district court for determination of attorney's fees and costs on appeal under 18 U.S.C. § 2520.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Catherine A. Heggy Plaintiff-Appellee,	)	
-vs-	)	No. 90-6122
	)	(D.C. No. 88-1185-R)
T. L. Heggy Defendant-Appellant.	)	

JUDGMENT
Entered October 2, 1991

Before MCKAY, Chief Judge, HOLLOWAY, Circuit Judge, and WINDER District Judge.

*The Honorable David K. Winder of the United States District Court for the District of Utah, sitting by designation.

This cause came on to be heard on the record on appeal from the United States District Court for the Western District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgement of that court is affirmed.

Entered for the Court
ROBERT L. HOECKER, Clerk

/s/ Patrick Fisher
By Patrick Fisher
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Catherine A. Heggy a/k/a C.A. Heggy; Plaintiff-Appellee,	)	
-vs-	)	No. 90-6122
	)	(D.C. No. 88-1185-R)
T. L. Heggy a/k/a/ Tom Heggy, Defendant-Appellant.	)	

ORDER
Entered November 7, 1991

Before MCKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, Circuit Judges, and WINDER, *District Judge.

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*The Honorable David K. Winder of the United States District Court for the District of Utah, sitting by designation.

This matter comes on for consideration of appellant's suggestion for rehearing en banc, which the court treats as a petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court
/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF OKLAHOMA

CATHERINE A. HEGGY, a/k/a/ Plaintiff,	)	
-vs-	)	CIV 88-1185-R
TOM HEGGY, Defendant.	)	

ORDER

Before the Court is Defendant's motion to dismiss Plaintiff's Complaint pursuant to F.R.Civ. P. 12(b)(6). The Complaint alleges that Defendant violated the federal wiretapping statute, Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510 *et seq.*, by placing or causing certain other unknown person or persons to attach an electronic recording device to the telephone at Plaintiff's home and recording conversations between the Plaintiff and third persons without their knowledge or consent. See Complaint at ¶ 5. Plaintiff seeks relief there for pursuant to 18 U.S.C. § 2520, creating a civil cause of action against one who violates or procures violation of the federal wiretapping statute.

As grounds for his motion, Defendant asserts that 1) the federal wiretapping statute was not intended to and does not apply to a spouse's placement of a recording device on phones within the marital home; and 2) the Complaint alleges a domestic dispute which public policy and traditional practice require be relegated to a state court.

Defendant relies primarily upon *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897, 95 S.Ct. 176, 42 L.Ed.2d 141 (1974), and *Anonymous v. Anonymous*, 558 F.2d 677 (2nd Cir. 1977) to support the former argument and on *Kempf v. Kempf*, 677 F. Supp. 618 (E.D. Mo. 1988) and *Lizza v. Lizza*, 631 F. Supp. 529 (E.D.N.Y. 1986) to support the latter argument.

Plaintiff in response asserts that the view expressed in the *Simpson* case, that the wiretapping statute is inapplicable to interspousal phone tapping within the marital home, is a minority view, rejected by those circuits which have subsequently considered the issue. Plaintiff cites *Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984); *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976); and *White v. Weiss*, 535 F.2d 1067 (8th Cir. 1976). Moreover, Plaintiff contends that the clear and unambiguous language of Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510, makes the Act applicable to all wiretaps except those expressly excepted. Since interspousal wiretaps are not expressly excepted, the Act applies to the circumstances alleged herein, Plaintiff argues.

Initially, the Court observes that even though it may reasonably be inferred from the Complaint that Plaintiff and Defendant were married at the time of the alleged wiretapping, *see* Complaint at ¶ 7, it is not alleged in or inferable from the Complaint that Defendant was living in Plaintiff's home at the time of the alleged wiretapping. Accordingly, on the basis of the pleading alone, the Court could not say as a matter of law, under any of the authorities cited, that

Plaintiff could prove no set of facts entitling her to relief. *Compare Simpson v. Simpson*, 490 F.2d 803 (no civil liability for a husband's taping of spouse's conversations within the joint home) and *United States v. Schrimsher*, 493 F.2d 848 (5th Cir. 1974) (defendant's electronic interception and taping of telephone conversations of his lover, who was also the mother of defendant's child, from under the house was a criminal violation) *with United States v. Jones*, 542 F.2d 661 (defendant's electronic surveillance of his wife, from whom he was separated at the time, from outside the home, constituted a criminal violation). *See also Anonymous v. Anonymous*, 558 F.2d at 679. In short, a fact question is presented as to whether the alleged interception and recording in this case occurred while Defendant and Plaintiff shared a marital home.

Plaintiff, however, does not dispute that Defendant and Plaintiff were living together at the time of the alleged electronic surveillance and recording and argues that even if that was the case, the federal wiretapping statute applies and civil liability lies thereunder for Defendant's conduct. Accordingly, the Court addresses the legal issue of whether interspousal electronic surveillance within the marital home is actionable under 18 U.S.C. § 2520.

Regardless of the factual distinctions that may be drawn on a case-by-case basis, there is a fundamental division between courts which have considered the issue of whether the federal wiretapping statute applies to interspousal surveillance and recording within the marital home. Two circuit courts and a number of district courts have held that it does not.

See Anonymous v. Anonymous, 588 F.2d 677 (2nd Cir. 1977); *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.) *cert. denied*, 419 U. S. 897, 95 S.Ct. 176, 42 L.Ed.2d 141 (1974); *Platt v. Platt*, 685 F. Supp. 208 (E.D. Mo. 1988); *Kempf v. Kempf*, 677 F. Supp. 618 (E.D. Mo. 1988); *Lizza v. Lizza*, 631 F. Supp. 529 (E.D.N.Y. 1986). Three circuit courts and a number of district courts have held that the federal wiretapping statute applies to interspousal interception and recording in the marital home. *See Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984); *United States v. Jones*, 742 F.2d 661 (6th Cir. 1976); *White v. Weiss*, 535 F.2d 1067 (8th Cir. 1976); *Nations v. Nations*, 670 F. Supp. 1432 (W.D. Ark. 1987); *Flynn v. Flynn*, 560 F. Supp. 922 (N.D. Ohio 1983); *Heyman v. Heyman*, 548 F. Supp. 1041 (N.D. Ill. 1982); *Kratz v. Kratz*, 477 F. Supp. 463 (E.D. Pa. 1979). *See generally* C. Fishman, *Wiretapping and Eavesdropping* § 25.1 (Cum. Supp. 1988); Anno., 55 ALR Fed. 936. Neither the Tenth Circuit nor any court in this district has addressed the issue, although the Tenth Circuit has acknowledged that a private detective's interception and recording of the spouse's telephone conversations with the consent of the other spouse would constitute a violation of Title III of the Omnibus Crime Control and Safe Streets Act, which, by inference, would give rise to civil liability as well. *See Anthony v. United States*, 667 F.2d 870, 876 (10th Cir. 1981), *cert. denied*, 457 U.S. 1133, 102 S.Ct. 2959, 73 L.Ed.2d 1350 (1982).

The Court has reviewed all of the above-cited cases and the language and legislative history of Title III of the Omnibus Crime Control and Safe Streets Act. The Court concludes that the better-reasoned cases, which are supported by the clear and

unambiguous language of the statute, the lack of an express statutory exception for interspousal interceptions and recordings and Congressional intent discerned both from the language of the statute and the legislative history, hold that the federal wiretapping statute applies to interspousal surveillance within the marital home.

There is no question but that the "naked language" of the federal wiretapping statute reaches interspousal interceptions. *Simpson v. Simpson*, 490 F.2d at 805. "The language of § 2522(1)(a) quite clearly expresses a blanket prohibition on all electronic surveillance except under circumstances specifically enumerated in the statute . . . ." *United States v. Jones*, 542 F.2d at 667. Congress carved out certain " definitional" exemptions, *see* 18 U.S.C. § 2510(5), and a number of specific exceptions, *see* 18 U.S.C. § 2511(2), to the statute's applicability, and has specified in what circumstances and by whom authorization for interception of wire, oral or electronic communications may be sought, the procedure therefor, from whom authorization may be obtained, and when and to whom disclosure of such may be made, *see* 18 U.S.C. § 2516, § 2517 and § 2518. But Congress did not create any exception for interspousal interceptions from either criminal or civil liability. *See* 18 U.S.C. § 2522(1)(a) & (b) and 18 U.S.C. § 2520. Yet legislative history makes it clear that Congress was well aware, prior to the enactment of the broad statutory prohibition on the interception of communications through electronic means, *see* 18 U.S.C. § 2511 and 18 U.S.C. § 2520, that one of the two or three major areas for the use of surveillance techniques was in divorce cases. *See* Hearings on

Invasions of Privacy Before the Subcomm. on Administrative Practice & Procedure on the Judiciary, 89th Cong., 1st Sess., pt. 5 at 2261 (1965-66) (testimony of Senator Long, Chairman of the subcomm., quoted in part in *United States v. Jones*, 542 F.2d at 668 n. 12) and Hearings on The Right to Privacy Act of 1967 before the Subcomm. of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess., pt. 2 at 413 (1967)(testimony of Professor Robert Blakely, quoted in part in *United States v. Jones*, 542 F.2d at 669 & n. 14). Indeed, it appears that that Congress specifically intended Title III of the Omnibus Crime Control and Safe Streets Act to prohibit electronic surveillance in domestic relations situations or for use in marital litigation. *See* S. Rep. No. 1097, *reprinted in* 1988 U. S. Code Cong. & Ad. News 2274 (comments of Senator Hruska, one of the co-sponsors of the bill that became Title III, quoted in part in *Jones*, 542 F.2d at 669). *See also United States v. Jones*, 542 F.2d at 669 n. 16, *quoting* statements of various senators in the Congressional Record. Particularly in view of this legislative history, the Court finds the otherwise imperfect analogy to the exception afforded in Section 2510(5) of the Act employed by the court in *Anonymous v. Anonymous*, 558 F.2d 677, to be unpersuasive, and the implied exception to the federal wiretapping statute of interspousal interceptions in the marital home, created by some courts, to be an unwarranted intrusion upon Congressional prerogative. This Court holds that Title III of the Omnibus Crime Control and Safe Streets Act, specifically 18 U.S.C. § 2520 thereof, applies to interspousal wiretaps.

Because public policy concerning wiretaps, including interspousal wiretaps and civil liability therefor as an appropriate subject for federal litigation, *see* 18 U.S.C. § 2520, is clearly expressed in the federal wiretapping statute, the Court rejects Defendant's second argument as well.

Defendant's motion to dismiss is denied.

IT IS SO ORDERED this 20th day of September, 1988.

/s/David L. Russell
DAVID L. RUSSELL
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

CATHERINE A. HEGGY
Plaintiff

JUDGMENT IN A CIVIL CASE

v.

TOM HEGGY
Defendant. CASE NUMBER: Civ-88-1185-R

XX **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

— **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED we the jury find in favor of Plaintiff, and award compensatory damages in the amount of $75,000.00 and in favor of the plaintiff for punitive damages in the amount of $140,000.00

February 28, 1990
Date

Robert D. Dennis
Clerk

/s/ Nance Estip
(By) Deputy Clerk

ENTERED IN JUDGEMENT
DOCKET ON 2-28-90